No. 15119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

On Appeal From the United States District Court for the District of Nevada.

APPELLANT'S REPLY BRIEF.

MAURICE J. HINDIN,
6399 Wilshire Boulevard,
Los Angeles 48, California,
Attorney for Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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APPELLANT'S REPLY BRIEF.

The brief of Appellee raised two matters to which Appellant desires to reply. These matters are, as follows:

1. The Appellee contends that the errors asserted in Appellant's Brief should not be considered by reason of asserted failure of Appellant to comply strictly with the technical requirements of Rule 18 of Rules of the United States Court of Appeals.

2. Appellee contends that errors urged by Appellant were not "plain error" within the meaning of Section 52b of the Federal Rules of Criminal Procedure.

Appellant's reply to these two contentions of Appellee will be set forth and stated separately in the next section of this Reply Brief.

ARGUMENT.

I.

The Errors Urged in Appellant's Brief Should Be Considered Notwithstanding Any Technical Deficiency of the Briefs With Reference to Rule 18.

Appellee asserts that Appellant's Brief failed to comply with the technical requirements of Rule 18 in that the specifications of error are not properly set forth, and that the instructions complained of in Appellant's brief have not been referred to *totidem verbis,* and that the grounds of the objections urged at time of trial were not properly set forth.

Appellant respectfully desires to call to the Court's attention the fact that a Transcript of the entire proceedings before the trial court has been prepared and is part of the record on appeal. Likewise, each instruction referred to in Appellant's brief is set forth in the Transcript of the Record commencing at pages 323 to 353, and that all instructions, both given by the trial court and refused, are set forth *in totidem verbis* in the Transcript of the Record. Likewise, throughout Appellant's brief, specific reference is made to each of the instructions at their appropriate page in the Transcript.

Each of the grounds of objection to the instructions urged at the trial are set forth in full in the Transcript of the Record commencing at page 353 of the Transcript. Appropriate reference to the Trancript of the Record pages is made to these objections where referred to in the Appellant's Brief.

The specifications of error are set forth on page 3 of the Appellant's Opening Brief and also set out as section headings under the Argument section of the Appellant's Brief. The Appellee, we respectfully submit,

was able to clearly understand the import and context of each specification of error even though the errors were referred to as grounds for reversal rather than being termed specifications of error as such.

Appellant, however, desires to comply, if possible, with the letter as well as the spirit of the Rules and, therefore, respectfully submits as part of this brief an appendix section in which the specifications of error are set forth in a form perhaps more in accord with the letter of the Rules of this court than the form originally adopted in Appellant's Opening Brief. Likewise, in the Appendix section Appellant has set forth each instruction referred to in Appellant's Opening Brief *totidem verbis,* as well as other pertinent matter taken directly from the Transcript of the Record.

While this court in the case of *Gordon v. United States,* 202 F. 2d 596, cited by Appellant, has indicated that errors alleged in an Appellant's Brief need not be considered where the Appellant has failed to comply with the requirements of the Rules relating to briefs, it should be noted that in that case as well as in each of the other cases cited therein on the point, the Court did in fact consider the respective points raised by the Appellant notwithstanding the technical defects of the briefs.

It is respectfully submitted that the points urged by Appellant herein relate to substantial rights of the Appellant, and it is respectfully submitted that notwithstanding any defect as to form which might exist as to the Appellant's Brief and which have not been corrected by the incorporation herein of the Appendix hereto, the points urged therein on behalf of the Appellant should be fully considered by the Court.

II.

Errors Urged by Appellant Constituted Reversible Error Both Under Provisions of Rule 30 of the Federal Rules of Criminal Procedure as Well as Rule 52b of the Rules of Criminal Procedure.

Objections were noted at the time of trial to the court's refusal to give Defendant's instructions B and C [Tr. R. p. 354. See also the Appendix to this Brief]. Objections were noted at the time of trial to the court's giving of instructions Nos. 26 and 27 [Tr. R. p. 356. See Appendix attached to this Brief]. The refusal of the court to give the Defendant's requested instructions C and B are the subject of the errors urged before this court in Section 1C and 1F, respectively, of Appellant's Opening Brief. The objections to the court's instructions Nos. 26 and 27 are the subject of Appellant's assignment of error set forth in Sections 1D and 1F of Appellant's Opening Brief. As to each of these matters, it is respectfully submitted that the Defendant in the trial court stated distinctly the matter to which he objected and the grounds of his objection. Appellant has found no authority requiring the Defendant to use any particular language in identifying the matter to which he objects or in stating the grounds of his objection. It is, therefore, respectfully submitted that the Appellant has substantially complied with the requirements of Rule 30 of the Federal Rules of Criminal Procedure.

With reference to Appellant's objections to the sufficiency of the instructions relating to reasonable doubt, character testimony, and definition of inadequacy of the books (Sections 1A, 1B and 1E of Appellant's Opening Brief), no objections were made in the trial court (See Appendix). Appellant respectfully urges that as to each

of these matters, "plain error" within the meaning of Rule 52b of the Federal Rules of Criminal Procedure was committed by the trial court.

It is the duty of the trial judge to charge the jury on all essential questions of law whether requested or not. *Morris v. United States,* 156 F. 2d 525. The failure of the trial court to give instructions on essential points of law is plain error which may be noticed even in the absence of an exception. *Schino v. United States,* 209 F. 2d 67. Likewise, an erroneous instruction affecting the substantial rights of a defendant has been held to constitute plain error and may constitute grounds of reversal on appeal even though no objection was made to the erroneous instruction in the trial court. *Bloch v. United States,* 221 F. 2d 786.

Whether or not instructions, be they given or refused constitute plain error, require the reviewing court to consider all of the instructions given on the subject matter under inquiry in any given case. In *Herzog v. United States,* 226 F. 2d 561, on rehearing *en banc,* 235 F. 2d 664, this court in speaking of the problem of determining this question used the following language which, we think, is particularly applicable to this case: "In determining whether the giving or failure to give an instruction warrants a reversal the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in the light of the factual situation disclosed by the record. Such is the course followed even in the normal criminal case, where the accused has preserved his right of review by timely and appropriate objection on the trial."

In this case, without repeating the substance of the points discussed in Appellant's Opening Brief, the Ap-

pellant respectfully urges that errors occurred in instructing the jury in not one applicable subject of law but in five. They are (1) the subject of reasonable doubt (Appellant's Opening Brief, page 4); (2) the subject of character witnesses (Appellant's Opening Brief, page 6); (3) the subject of cautionary instructions (Appellant's Opening Brief, page 8); (4) the subject of instructions with reference to the net worth method (Appellant's Opening Brief, page 11); and (5) the subject of instructions with reference to the adequacy of the Defendant's books (Appellant's Opening Brief, page 14).

Appellee suggests that some of the errors complained of, if erroneous at all, are harmless errors, and that, therefore, the judgment of conviction should be affirmed.

In *Bihn v. United States,* 328 U. S. 633, 66 Sup. Ct. 1172, 90 L. Ed. 1485, the Supreme Court in quoting from *McCandless v. United States,* 298 U. S. 342, used the following language: "An erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial." It would, therefore, appear to be the rule that all error which is found in a record is presumptively prejudicial error unless it affirmatively appears to the court that the error was not prejudicial. Assuming (but not conceding, however) that some of the errors complained of, if they stood alone, would be harmless error only, Appellant respectfully submits that a number of individual harmless errors in a record may well in their cumulative effect constitute plain error affecting the substantial rights of a defendant. Whether or not error in any given case is harmless or plain error as respects the substantial rights of the defendant is a matter of judgment transcending confinement by any for-

mula or precise rule. *Kotteakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557. The true test is what affect the errors may reasonably have had upon a jury's decision. *United States v. Donnelly,* 179 F. 2d 227. It is, we think, perfectly proper for a reviewing court to declare an isolated instance of error as harmless and yet hold that numerous instances of individual harmless errors had the cumulative effect of plain error.

Conclusion.

For the reasons heretofore stated, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.

APPENDIX.

I.

Specifications of Error.

Appellant specifies as error the following:

1. **The Court Erroneously Instructed the Jury and Failed to Adequately Instruct the Jury as to the Law of the Case, and the Instructions Given to the Jury, Taken All Together, Gave an Incomplete and Erroneous Statement of the Law of the Case Which Constituted Prejudicial Error.**

and in connection therewith specifies as error specifically the following:

A. The Court's Instructions Were Inadequate as to "Reasonable Doubt." The Court's Instructions on Reasonable Doubt Are Numbered

7 [Tr. R. p. 326]
10 [Tr. R. p. 328]
11 [Tr. R. p. 328]
12 [Tr. R. p. 328]
13 [Tr. R. p. 329]

Some reference to reasonable doubt is also found in instruction Number 45 [Tr. R. p. 345]. No objections were made at time of trial to any of these instructions. Each of these instructions is set forth *totidem verbis* in the next section of the Appendix to this brief.

B. The Court's Instruction Was Inadequate as to the Effect of Use of "Character Witnesses."

The only instruction given on this subject was numbered 49 [Tr. R. p. 346]. It is set forth *totidem*

verbis in the next section of the Appendix to this brief. No objection to this instruction was made at time of trial.

C. The Court Refused to Give Requested Cautionary Instructions.

Defendant requested instruction Numbered C [Tr. R. pp. 7-8]. The court refused to give this instruction, and Defendant made objections thereto [Tr. R. p. 354]. The instruction is set forth *totidem verbis* in Section III of the Appendix to this brief. The objections made are also set forth in Section IV of the Appendix to this brief.

D. The Court's Instructions Regarding the "Net Worth Method" Were Insufficient and Inaccurate.

The court gave instructions Numbered 26 and 27 [Tr. R. pp. 336-338] on the net worth method.

Instructions 26 and 27 are set forth *totidem verbis* in Section III of this Appendix to the brief.

Defendant made objections thereto [Tr. R. p. 356], and such objections are set forth in Section IV of the Appendix to this brief.

E. The Court Erred in Failing to Instruct the Jury as to the Adequacy of the Defendant's Books.

The Court's Instructions Nos. 26 and 30 made reference to the subject of the inadequacy of the defendant's books [Tr. R. pp. 336 and 339]. These instructions are set forth *totidem verbis* in the next section of this Appendix. Defendant objected to In-

struction 26 [Tr. R. p. 356] but did not object to Instruction No. 30.

The objections made to Instruction 26 are noted in full in Section IV of this Appendix.

F. The Court Erred in Refusing to Give Instructions B and C Requested by the Defendant.

Defendant's requested Instructions B and C [Tr. R. p. 354] were refused by the court. These instructions are set forth *totidem verbis* in Section III of this Appendix. The defendant's objections are noted in full in Section IV of this Appendix.

2. The Court Erred in Admitting in Evidence an Affidavit of the Defendant Referred to as "Government's Exhibit 32" [Tr. R. p. 209].

The affidavit is set forth in full in Section V of the Appendix hereto. The objections made thereto at time of trial are also noted in full in Section V of the Appendix hereto.

II.

Instructions Given, to Which Reference Is Made in Briefs.

No. 7

To the two charges or counts set forth in the information the defendant, upon his arraignment, pleaded "not guilty" to each count, thus putting in issue every material allegation contained in each of the two counts in the information, and it therefore becomes necessary for the prosecution to establish each and every one and all such allegations beyond all reasonable doubt. [Tr. R. p. 326.]

No. 10

You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt. [Tr. R. p. 328.]

No. 11

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. [Tr. R. p. 328.]

No. 12

A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life.

If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. [Tr. R. p. 328.]

No. 13

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you. [Tr. R. p. 329.]

No. 26

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man owns more property than he had at the beginning of the year, it goes wtihout saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of taxable income. [Tr. R. p. 336.]

No. 27

The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant's net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by substracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant's taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant's non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they are not represented in the assets which the defendant has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net forth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable. [Tr. R. p. 337.]

No. 30

Where a taxpayer's records are inadequate or inaccurate in substantial respect, it is proper to determine tax-

able income (1) by the net worth and expenditures method, (2) or by the bank deposits and cash expenditures method, (3) or both.

Of course, the government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof. [Tr. R. p. 339.]

No. 45

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant and inconsistent with any reasonable theory of the defendant's innocence.

In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that

count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the [365] crime has been made out against the accused beyond a reasonable doubt. [Tr. R. p. 344.]

No. 49

You are instructed, that some evidence has been received as to the character of the defendant. You will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty. [Tr. R. p. 346.]

III.

Instructions Requested by Defendant but Refused by the Court.

Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income.

See generally: Smith v. U. S., 348 U. S. 147.

Refused: Covered by No. 26 and No. 27. [Tr. R. p. 7.]

Instruction C

Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experi-

ence that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference would be income but there may be sources which increase net worth that are not taxable and would not be considered income.

See generally: 99 L. ed. 170.

Refused: Covered by No. 26 and No. 27. [Tr. R. p. 7.]

IV.

Proceedings in Trial Court on Objections to Instructions. Verbatim from Transcript of Record, Pages 353 to 358.

In Chambers—3:55 P.M.

Defendant present and defendant's counsel and government counsel present.

The Court: Let the record show that, pursuant to statement made in open court, we are meeting in chambers for the purpose of receiving counsel's objections to the instructions as given by the Court to the jury. Let the record show the presence of the defendant and his counsel and counsel for the government, and that the record is being made outside the presence of the jury.

Now, gentlemen, I think we will start with the plaintiff's case, and you can numerically make such objections as you see fit for the record.

Mr. Maxwell: Your Honor please, we accept the instructions as given and we wish to interpose no objections to the instructions as given.

The Court: Let the record so show. Now counsel for the defendant, you make any objections you have is the record as to your instructions, which are 7 in number and labeled A to G. We might let the record show that plaintiff's offered instructions were numbered 1 to 32, inclusive. You may proceed. [377]

Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court.

Defendant's Requested Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater worth on a later date, does not mean that the difference between the amounts is income.

We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court.

Defendant's Requested Instruction C

Ladies and gentlemen of the jury, it is my duty to say to you that the conclusion reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the Court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth [378] cases in the full realization that the taxpayer may be ensared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows—take all of the assets

of the taxpayer on a given date, which would include all tangible property, cash on hand or in bank account, securities, an accounts receivable, from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth of the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

We except to Instruction No. 8 as given, because it is not the law it is argumentative and uncertain and irrelevant.

We except to Instruction No. 14, because it is indefinite, misleading and lays down a rule that permits the conviction of the defendant for a felony under Section 145(b) on evidence [379] proving, or tending to prove a misdemeanor under Section 145(a).

We except to Instruction No. 17, because it would permit the conviction of the defendant under Section 145(b) on proof of violation of Section 145(a), and does not require the wilful attempt to evade taxes to be proved by independent evidence.

We except to Instruction No. 20, as it acts to modify defendant's requested Instruction D, in that the modification nullifies the request and by the modification the independent evidence to prove the wilfullness in the request is nullified. In other words, it does not require independent proof of wilfullness.

We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading.

We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading.

We except to Instruction No. 29, because it is not a correct statement of the law and is not adjusted to the evidence in this case and the government proceeded in this case under a hybrid method, and therefore is confusing and misleading.

We except to Instruction No. 37 because it is not adjusted to the evidence in this case, it is misleading and allows the jury to convict on evidence establishing nothing more than a [380] misdemeanor, and is in conflict with other instructions requiring proof by independent evidence of wilfullness and in conflict with Instruction No. 38.

We except to Instruction No. 38 because it tends to modify defendant's requested Instruction E, since it in effect destroys the full force and effect of the request, and is not adjusted to the evidence in this case as presented, as modified, and is confusing and misleading.

Defendant's Requested Instruction E

In this case you are instructed that you cannot infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

We except to Instruction No. 39, as it modifies defendant's requested Instruction F, since it eliminates therein phrases and words in the law as are contained in defendant's requested Instruction F.

Defendant's Requested Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and

with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfullness must be established by independent proof.

We except to Instruction No. 19 as given and as modifying defendant's requested Instruction G, as defendant's request correctly stated the law and by modifying it, renders it conflicting and confusing and indefinite and the modification destroys the force and effect of the request.

Defendant's Requested Instruction G

Wilfully means knowingly, with a bad heart and a bad intent. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid or careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or accountant, for there is not requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

The Court: Gentlemen, do you stipulate that the proceedings had here and now have the same force and effect as though had in open court?

Mr. Maxwell: So stipulated.

Mr. Pucinelli: So stipulated.

The Court: Let the record show all exceptions denied.

(Jury retired at 4:07 p.m.) [383]

V.

Proceedings in Trial Court Relative to Plaintiff's Exhibit 32 Taken From Transcript of Record, Page 208 to Page 210.

Q. You have handed me the affidavit which you have referred to [199] in your previous testimony here? A. Yes, sir.

Mr. Maxwell: I offer this in evidence as government's next in order.

The Court: No. 32.

Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness' evidence shows that it was not given freely and voluntarily, and upon the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year.

The Court: The objection is overruled on every ground. The offer is now received in evidence as government's Exhibit 32.

PLAINTIFF'S EXHIBIT NO. 32

Affidavit

State of Colorado,
County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax re-

turns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of $36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the internal Revenue Code or defraud the United States Government.

5. That this Affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.

[Seal] ROBERT D. WHITE,
Notary Public.

My commission expires June 4, 1955.